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ECONOMIC STABILIZATION: PRINCIPLES ON WHICH THE FAIR RENT IS FIXED.

REGULATION 16 of the Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), provides as follows :—

(1) On the hearing of any application to fix the fair rent of any property, the Court shall not have regard to the circumstances of the landlord or of the tenant or to any general or local increase in values since the first day of September, 1939, but after taking the general purpose of these regulations, any improvements to the property, and all other relevant matters into consideration shall fix as the fair rent such rent as in the opinion of the Court it would be fair and equitable for a tenant to pay for the property.

(2) The fair rent fixed as aforesaid shall not exceed the basic rent, unless the Court is satisfied, by evidence produced by the landlord, that in the special circumstances of the case it is fair and equitable that the fair rent should exceed the basic rent.

The majority of the Full Court (Sir Michael Myers, C.J., and Blair and Northcroft, JJ.) in *Otago Harbour Board* v. *Mackintosh, Cayley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, in considering cl. 2, said that it is impossible to lay down a definition of the term "special circumstances" as used therein. Smith, J., in the same connection, was of the opinion that, in determining an application under Reg. 16, the Court should first ascertain the "relevant matters" within cl. 1 for consideration, and it should then determine whether among them there are "special circumstances of the case."

In a recent judgment, on an application by a tenant to fix the fair rent of a property under Reg. 16, *Sievwright* v. *Wellington College and Girls' High School Governors* (to be reported), Mr. Justice Smith has given what, with respect, we consider an illuminating enunciation of the principles upon which the Court should determine the fair rent on such an application.

In April, 1927, the lessors had offered the demised property for lease by public auction, pursuant to the Public Bodies' Leases Act, 1908; and the applicant's bid was accepted. He then entered into a lease for a term of twenty-one years from April 12, 1927, with a perpetual right of renewal for terms of twenty-one years at a rental to be fixed by arbitration as provided in the lease, without taking into account the value of improvements. The detailed facts of the application are not material in considering the general principles laid down by the learned Judge. Suffice it to say that the basic rent, in this case, was the rent fixed by the lease; and that no question of "special circumstances" arose to justify an increase in the basic rent in favour of the lessors. It was the lessee who was asking for a reduction of his contract rent. In such a case, the learned Judge, referring to his judgment in the *Otago Harbour Board* case, at p. 37, said that the duty of the Court is to ascertain the relevant matters and fix the fair rent. His Honour then proceeded to consider these relevant matters *seriatim*.

"The General Purpose of the Regulations."

In expressing the general purpose of the regulations, which, His Honour said, is the first "relevant matter" for consideration, the learned Judge gave the following valuable (and might we add, with respect, the most understandable) exposition of economic stabilization, with special reference to rents, that we have yet read :—

The first relevant matter is the general purpose of the regulations. They have been made to promote the economic stability of New Zealand by enabling control to be exercised upon the economic situation which has followed the outbreak of the present war. An excess of currency, combined with a shortage of goods, services, and premises for civilian consumption and use, had started a spiral of rising prices and costs. At the end of 1942, it was thought desirable to stabilize the situation as far as possible. A person who was a debtor in one capacity but a creditor in another was to have his position stabilized. The maxim "one man's prices are another man's costs" states succinctly the truth which must lie at the basis of the policy. As regards rents, the rent payable at September 1, 1942, or fixed at that date, was taken as the basic rent. In other words, that rent was to be the lessor's price and the lessee's cost unless (*a*) the lessor could show by reference to "special circumstances" that the fair rent should exceed the basic rent, or (*b*) the lessee could show that the fair rent should be less than the basic rent. *Prima facie*, the general purpose of the regulations is satisfied if the rent payable at the date of stabilization is paid and accepted. The general intention is that the lessor shall receive rent of that amount to assist in meeting his outgoings as they have been stabilized at that date just as the lessee in his capacity as a creditor shall receive payment of the amounts to which he is entitled at that date to meet his outgoings as they have been stabilized at that date.

PRINCIPLES GOVERNING THE FIXING OF THE FAIR RENT.

It must not be overlooked that His Honour was dealing with a lease, which, in 1927, had been offered by the lessees at public auction, pursuant to the Public Bodies' Leases Act, 1908. He accordingly drew the distinction between (*a*) an application to fix the fair annual rent for the purposes of a new contract, and (*b*) an application to fix for the duration of an existing contract a new rent in lieu of the existing rent to which the parties have bound themselves by their contract. This, he observed, is a distinction of fundamental importance. Where an application is made to vary a rent during the term of the lease under which it is payable, the principle for determining the fair rent must be that the contractual rent is the fair rent, unless a sufficiently strong and cogent reason, permitted by the regulations, is shown for breaking and varying the contract. This is what His Honour said in this connection:

> When lessor and lessee are contracting for the grant of a lease in perpetuity under the First Schedule to the Public Bodies' Leases Act, 1908, the annual rent for the first term is fixed by the highest bid at a public auction. The rent for each subsequent term is what is termed in the Schedule "the fair annual rent" and it is fixed by the valuation of arbitrators. The highest rental which is bid for the first term not only fixes the rental for that term but secures to the successful bidder the right to hold against all the world a particular piece of land in perpetuity. The amount so bid depends upon the competition for that right. It does not depend upon the view of valuers that "the fair annual rent" should represent merely a moderate rate of interest upon the amount of the unimproved value. Bidders may go well beyond such a moderate rate in their desire to obtain the right to a particular lot. The auction at which the applicant obtained his lease affords, for the most part, impressive examples of this fact. On the other hand, when valuers have to fix "the fair annual rent," without reference to improvements, for the purpose of making a new contract, they are required to proceed upon the principles which have been laid down by law: see *Drapery and General Importing Co. of New Zealand, Ltd.* v. *The Mayor, &c., of Wellington*, (1912) 31 N.Z.L.R. 598; *New Plymouth Borough* v. *Bonner*, [1929] N.Z.L.R. 217; and *In re a Lease, Wellington City Corporation to Wilson*, [1936] N.Z.L.R. s. 110. In the last-mentioned case, it was held that the ground rental for a renewed term between a lessor and a building lessee should be represented by a moderate rate of interest on the capital value of the unimproved land. This rule seems to have had much influence upon the evidence placed on affidavit in this case, but it has no relevance to the question at issue. It is a rule of guidance which applies where the parties are making a new contract for a new term pursuant to the method of valuation upon which they have agreed. It has no relevance to the question whether the highest rental bid at a public auction for the first term of a lease in perpetuity, which carries with it the right to hold the land in perpetuity, is fair or not during the continuance of the first term.

In His Honour's opinion, the principle for deciding whether that rent is fair or not during its term is that the contractual rent freely bid at the auction is the fair rent, unless matters which are relevant under the Stabilization Regulations can be established which are so strong and cogent as to justify the breaking and varying of the contract.

The sanctity of contractual obligations has become somewhat overlooked in legislation that we have experienced in recent years, most of it passed to meet some particular or extraordinary circumstance. His Honour, in considering this fact, said:

> The operation of the legislation passed to permit the control of the economic crises which have twice occurred since the last war has so accustomed the community to the variation of contractual obligations that many persons do not at first sight recognize that, during the term of a contract, the contractual obligations are the fair obligations unless the conditions upon which the parties thought they acted either did not exist or have radically changed.
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> Under the ordinary law, contracts stand unless they have been induced by misrepresentation or mistake or undue influence or have been discharged through breach or frustrated through some occurrence for which neither party is responsible or the like. Something corresponding to frustration has constituted the moral justification for the general legislative interference with contracts during the economic depressions which have occurred since the last war.
>
> During those depressions, the economic conditions of the country changed so rapidly and so gravely that it became impracticable for honest persons to meet in due course their obligations under their mortgages, leases, and other contracts. Consequently, a moratorium was imposed, and tribunals were set up to rearrange obligations upon what was considered a fair basis in the light of the altered economic conditions.
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> A similar serious change in the economic conditions upon which the stabilization policy has been imposed would, no doubt, constitute a sufficient reason for varying a basic rent during a contractual term. But where application is made to vary a rent during the term of the lease under which it is payable, the principle for determining the fair rent must be that the contractual rent is the fair rent unless a sufficiently strong and cogent reason, permitted by the regulations, is shown for breaking and varying the contract during its term.
>
> The other relevant matters upon this application are those which may be submitted as sufficient to justify the alteration of the contractual rent during its term. A fall in values since September 1, 1939, if it had occurred, could be submitted for consideration: *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd., supra*, at p. 34. Obviously, there has been no such fall in values and none has been suggested. Prices have been rising, costs, too; but currency is plentiful. However, the fairness of the present contractual rent for the first term which was fixed under the economic conditions of 1927 may have been viewed during the economic depressions which followed the years 1920 and 1930 respectively, it is quite impossible to say that a rental which was bid under the economic conditions of 1927 is unfair when judged by the economic conditions which have obtained since 1939.

"OTHER RELEVANT MATTERS."

The learned Judge went on to consider the other relevant matters upon the application before him. With reference to it, he said:

> The only matter which has been submitted as relevant to show that the present contractual rent should be now reduced for the rest of the term of the lease—that is, until April, 1948—is that the applicant's basic rental is anomalously high when compared with other rents with which it may be reasonably be compared. I am not clear that the Stabilization Regulations contemplate that a basic rent should be *reduced* because it appears to be anomalously high. In *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, (*supra*), Part III of the Stabilization Regulations was construed in the light of Part IV. Under Part IV, anomalies are relevant to the question of an increase in the basic rate of remuneration. Although Regs. 32 (5), 34 (5), and 42 contemplate reductions as well as increases in rates or remuneration, Regs. 35, 38, and 39 which refer to anomalies appear to contemplate that the function of an anomaly is to justify an increase, not a reduction, in the rate of remuneration.

His Honour did not decide this matter. However, he assumed that, if the applicant could show that his basic rent was anomalously high when compared with the standard of other rents with which it might be reasonably be compared, he would have established a matter which was relevant to the consideration of the question whether, in order to make his rent fair, his basic rent should be reduced during the term of the contract under which it is payable.

If, under the regulations, an applicant may show that his basic rent is anomalously high when compared with the standard of other rents with which it may be compared—and it must be remembered that the learned Judge did not so hold—then the first question would

be: What are the rents with which the applicant's rents may be reasonably compared? Reductions made in sympathy with the policy of deflation expressed by the National Expenditure Adjustment Act, 1932, would be irrelevant. As Reg. 16 (1) prevents the Court from taking into account the circumstances of the lessor and the lessee, any reductions granted for reasons personal to the lessee are excluded from consideration. His Honour said that only rents payable since the commencement of the stabilization policy can be relevant for the purpose of showing by comparison that an applicant's rent is anomalously high.

Another irrelevant consideration would be the rentals paid for renewed leases in perpetuity in the neighbourhood of the applicant's property: these would have been fixed by valuers who were required to make new contracts for the parties by fixing "the fair annual rent" of the land in accordance with principles that have been laid down by authority. No such restrictions, His Honour said, apply to the bidding for a first term; and they are not relevant to the determination of the question whether the rental bid for that term, which secures to the highest bidder his right to a particular piece of land in perpetuity, is fair or not during the continuance of the first term. Rentals which would be relevant for comparison, if they could be fairly compared, are the other rentals presently payable which were bid at the auction at which the applicant obtained his lease. The onus rests upon the applicant of showing that these first rentals so bid may be fairly compared for the purpose of satisfying the Court that his own rental is anomalously high. Another matter which might arise on an application is this: Whether the anomaly, if it existed, is such as to justify the breaking and varying of the contract during its term. This, and other possibly relevant matters, did not fall for consideration on the application under notice, as His Honour, on the assumption to which we have referred, held that as the applicant had failed to discharge the onus on him; and, on all the tests applied by His Honour, and after consideration of the relevant matters, as above set out, the application was dismissed.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1944.
March 27;
April 28.
Myers, C.J.,
Blair, J.
Smith, J.
Kennedy, J.
Johnston, J.
Fair, J.
Callan, J.
Northcroft, J.
Finlay, J.

THE KING v. NEILING.

Criminal Law—Appeal against Sentence—Practice—Dismissal of Application for Leave to Appeal against Sentence—Prisoner not represented by Council or informed of his Right to have Counsel—Whether entitled to make another Application—Crimes Amendment Act, 1920, s. 2—Crimes Act, 1908, s. 354, Rules (1921 New Zealand Gazette, *2049*).

A convicted prisoner, who has appealed under s. 2 of the Crimes Amendment Act, 1920, under the rules made under s. 354 of the Crimes Act, 1908 (*1921 New Zealand Gazette*, 2049) for leave to appeal against his sentence as excessive, and whose application, after being duly considered by the Judges of the Court of Appeal individually and subsequently by them jointly has been dismissed in open Court, cannot apply for leave to again appeal against his sentence as excessive, although on the first application he was not represented by counsel or informed by the Court that he had a right to have counsel.

Counsel: *Leicester*, for the prisoner; *Solicitor-General* (*Cornish*, K.C.), for the Crown.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the prisoner; *Crown Law Office*, Wellington, for the Crown.

SUPREME COURT.
Wellington.
1944.
April 19, 26.
Johnston, J.

RICHARDSON ET UX v. YATES.

Landlord and Tenant—Rent Restriction—Recovery of Possession—Refusal of Order by Magistrate—Subsequent Action for Recovery of Possession in Supreme Court—Whether Plaintiff estopped from Recovery—Fair Rents Act, 1936, ss. 2, 3, 20.

Section 20 of the Fair Rents Act, 1936, does not prevent the purchaser of a house (occupied by a tenant), who has sued for possession thereof in the Magistrates' Court and been refused an order, from bringing an action and obtaining an order in the Supreme Court for possession, even if the circumstances remain the same as when the Magistrate gave his decision.

Aitken v. *Smedley*, [1921] N.Z.L.R. 236, G.L.R. 92, applied.

Bydder v. *Bethune*, [1937] N.Z.L.R. 704, G.L.R. 438; aff. on app. [1938] N.Z.L.R. 1, [1937] G.L.R. 665, referred to.

Counsel: *Harding*, for the plaintiffs; *C. H. Taylor*, for the defendant.

Solicitors: *Phillips and Coles*, Wellington, for the plaintiffs; *Crown Law Office*, Wellington, for the defendant.

COMPENSATION COURT.
Auckland.
March 2, 28.
O'Regan, J.

ROBERTS v. MARTHA GOLD-MINING COMPANY (WAIHI), LIMITED.

Workers' Compensation—Liability for Compensation—Annual Holiday—Injured Worker's Annual Holiday on Full Pay falling within Period of Incapacity—Whether entitled to both Holiday Pay and Compensation—Workers' Compensation Act, 1922, s. 61—Workers' Compensation Amendment Act, 1943, s. 4.

Section 4 of the Workers' Compensation Amendment Act, 1943, which came into force on November 1, 1943, must be read as if the words "in respect of his disablement" appeared after "incapacity" in the fifth line of the said section.

McDermott v. *Tintoretto* (*Owners*), [1910] A.C. 444, 3 B.W.C.C. 403, applied.

The scope of s. 61 of the Workers' Compensation Act, 1922, which refers to two classes of payment made in respect of the one injury is still in operation and the said s. 4 of the amending statute has not extended the scope of s. 61, but has abolished the deduction of statutory payments such as those payable to seamen and has ordained instead the exclusion of the term covered by them from the period of liability under the Workers' Compensation Act, 1922.

The plaintiff, before the coming into operation of the Workers' Compensation Amendment Act, 1943, was entitled under an award to a maximum of ten days' annual holiday to be taken between December 24 and January 4, and to be paid the equivalent of wages for the period. He was injured on December 8 and totally disabled until January 5, so that the holiday fell within the period of incapacity.

Held, That he was entitled both to holiday payment and compensation.

Counsel: *Sullivan*, for the plaintiff; *Hore*, for the defendant.

Solicitors: *J. J. Sullivan*, Auckland, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

COURT OF ARBITRATION.
Auckland.
1944.
May 9.
Tyndall, J.

In re **RUTTER AND J. J. CRAIG, LIMITED.**

Industrial Conciliation and Arbitration Acts—Award—Wages—Jury Service—Worker attending Supreme Court on Jury Service for a Fortnight, from Monday to Friday inclusive—Whether disentitled to Wages during such Period.

An award directed, *inter alia*,

"Employers shall be entitled to make a rateable deduction from the weekly wages provided for herein for time lost by the worker's own default or through sickness or accident."

A worker subject to the award was required to attend the Supreme Court for jury service from Monday to Friday inclusive, for each of two consecutive weeks. His ordinary working week, under his contract of service with his employers was forty-four hours, included a period to be worked on Saturday mornings: but he did not report for duty on either of the Saturday mornings when he was free from jury service.

On an application for interpretation of the award in question,

Held, That there was complete failure of consideration for a period of two weeks; and, consequently, the worker was not entitled to receive wages in respect of the period of two weeks during which he was engaged on jury service.

Petrie v. *Mac Fisheries, Ltd.*, [1940] 1 K.B. 258, [1939] 4 All E.R. 281; *O'Grady* v. *M. Saper, Ltd.*, [1940] 2 K.B. 469, [1940] 3 All E.R. 527; and *Poussard* v. *Spiers and Pond*, (1876) 1 Q.B.D. 410, applied.

In re Wellington Industrial District Engineers Award, (1924) 24 Bk. of Awards, 1097, distinguished.

EVIDENCE IN RUNNING-DOWN CASES.

Admissibility of Convictions.

By J. D. WILLIS, LL.M.

It has no doubt been generally appreciated for a very long time that when the driver of a motor-vehicle has been convicted of driving without due care and attention, or for some other traffic offence, evidence of such conviction is not admissible against him in subsequent civil proceedings arising out of the same facts. (See, for example, Mazengarb, *Negligence on the Highway*, 387). Nevertheless, the fact is that some counsel do from time to time, particularly in the lower Courts, seek to tender such inadmissible evidence. The judgment of the Court of Appeal in England in *Hollington* v. *F. Hewthorn and Co., Ltd.*, [1943] 1 K.B. 587, [1943] 2 All E.R. 35, has now put the matter beyond all doubt. Dealing as it does at length with the admissibility in evidence in civil proceedings of a conviction obtained in criminal proceedings, the judgment in this case is of considerable practical importance and also of no little interest.

The plaintiff's car, while being driven by his son (since deceased, though not as a result of the accident) was involved in a collision with a car owned by the defendant. The plaintiff brought an action for damage to his car, and, as administrator, for personal injury sustained by his son. The defendant denied negligence on the part of its driver, and pleaded contributory negligence. Owing to the death of his son, the plaintiff was unable to adduce any direct evidence of the accident, and he tendered in evidence, in addition to evidence as to the position and condition of the two vehicles after the collision, a certificate that the defendant's driver had been convicted of driving without due care and attention at the time and place of the collision. It was argued on his behalf that he was entitled to put in the conviction not as conclusive, but as *prima facie* evidence, that the defendant's employee was driving negligently. Hilbery, J., rejected the certificate of conviction on the ground that it was *res inter alios acta*, and his decision was affirmed by the Court of Appeal.

The Court pointed out that it has been the invariable practice of the Judges for many years, certainly for so long as any member of the Court had been in the profession, to reject this class of evidence, so that nowadays counsel (in England) have ceased to tender it in accident cases. In this particular case counsel contended for its admission because the material witness was dead and they had to consider whether there was evidence which, according to the rules of law, was admissible, whatever the prevailing practice might be.

The judgment of the Court (delivered by Goddard, L.J.), stresses the question of relevancy, because it is relevancy that lies at the root of the objection to the admissibility of the evidence in question. In this connection, we are reminded . . .

> in former days, the law paid more attention to the competency of witnesses than to the relevance of testimony. We are apt to forget that it was not only the parties who were incompetent, but also any person who was or could be interested in the question at issue; so that parties would sometimes go to Court with releases already executed under seal, ready to be tendered to a witness to free him from any possible obligation that might prove an objection to his giving evidence. It was not till the Evidence Act, 1843, that interested witnesses, other than the parties, their husbands and wives, were rendered competent; and by the Evidence Act, 1851, the parties, and by the Evidence (Amendment) Act, 1853, their husbands and wives were at last enabled to give evidence. The law being what it was before these statutes were passed, it is not surprising to find Sir FitzJames Stephens saying, in his *Digest of the Law of Evidence*, that the law of competency was formerly the most, or nearly the most, important and extensive branch of the law of evidence; and that rules of incompetency are nearly the only rules of evidence treated of in the older authorities. But, nowadays, it is relevance and not competency that is the main consideration; and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.

Is it, then, relevant to an issue whether the defendant, by negligent driving, collided with and thereby injured the plaintiff, to prove that he had been convicted of driving without due care and attention on the occasion when the plaintiff was injured? The plaintiff admitted that he would have to identify the negligent driving which formed the subject of the charge with that which caused the injury to the plaintiff, for the record of the conviction itself would show no more than that the defendant was convicted for so driving on a certain day and in a certain place. The conviction was only proof that another Court considered that the defendant was guilty of careless driving. The Court which has to try the claim for damages knows nothing of the evidence that was before the Criminal Court: it cannot know what arguments were addressed to it, or what influenced the Court in arriving at its decision. Moreover, the

issue in the criminal proceedings is not identical with that raised in the claim for damages.

It is a rule of general application that only the best evidence is admissible. Where the only witness to a fact is dead, a party is often placed in great difficulty; but with certain well-settled exceptions, the death of a witness does not on that account render admissible evidence that would be objectionable if he were still alive. These exceptions are dying declarations, in the case only of murder and manslaughter, declarations against interest, &c. (to which must be added in New Zealand certain statutory provisions as to putting in depositions taken under the Justices of the Peace Act, 1927). None of these exceptions applied in the present case, and therefore the fact that the plaintiff's son had since died, afforded no ground for allowing a conviction which would not have been evidence had he been alive, to be now put in.

Of course, had the defendant before the Magistrates pleaded guilty, or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.

In the various textbooks on the law of evidence, *Re Crippen*, [1911] P. 108, is referred to as establishing an exception to the rule that a judgment against a party in a criminal case is not evidence against him in a civil suit, even of the fact on which the conviction must have proceeded. In that case it was held that a certified copy of the conviction of a husband for the murder of his wife is admissible in evidence against him in a civil proceeding *inter alios acta*, and is admissible not merely as proof of the conviction, but also as *prima facie* evidence of the commission of the crime. The Court of Appeal in *Hollington's* case were of opinion that the authorities did not justify Sir Samuel Evans, P., in admitting the conviction as proof that the husband had murdered his wife. They took the view that *Re Crippen* and two other cases which had been relied on by the plaintiff—namely, *Partington* v. *Partington*, [1925] P. 34, and *O'Toole* v. *O'Toole*, (1926) 42 T.L.R. 245, go beyond and are contrary to the authorities, and ought not to be followed in future. They can now be regarded as overruled.

On the question generally, the Court of Appeal said this:

> The contention that a conviction or other judgment ought to be admitted as *prima facie* evidence is usually supported on the ground that the facts have been investigated, and the result of the previous investigation is, therefore, at least some evidence of the facts that have been established thereby. To take the present case, it could be said that the conviction shows that the Magistrates were satisfied, on the facts before them, that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the Criminal Court was not satisfied of his guilt; though the discussion by text-book writers and in the cases all turn on the admissibility of convictions, not of acquittals. If a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal: and this only goes to show that the Court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case.

In the result, therefore, the Court of Appeal were of opinion that both on principle and on authority, the conviction had been rightly rejected by Hilbery, J. They make it clear that it is safer in the interests of justice that on the subsequent trial the Civil Court should come to a decision on the facts placed before it, without regard to the result of other proceedings before another tribunal.

The judgment in *Hollington's* case is instructive on many points relating to the law of evidence and merits careful perusal.

AGREEMENTS FOR SALE AND PURCHASE OF LAND.

By E. C. Adams, LL.M.

The holding of land, under agreement for sale and purchase, is so common in New Zealand, that one may well wonder why the subject is not treated at greater length in our textbooks on property and contract and in our precedent books.

1. *Advantages and Disadvantages of Agreements for Sale and Purchase.*—The holding of land under agreement for sale and purchase has its disadvantages, both for the vendor and the purchaser. Nevertheless, it must be conceded that long-term agreements for sale and purchase, especially where the principal and interest are payable at frequent intervals in small sums—*e.g.*, Precedents Nos. 1 and 6—have enabled many persons of modest means, to secure a home, where no other way was practicable; such agreements therefore have economic advantages, beneficial to the community, and in the future will probably be more widely used than heretofore.

The disadvantages from the vendor's point of view, where the purchase price is spread over a long term of years, are set out in *Goodall's Conveyancing in New Zealand*, 41 note (*h*). In a note at p. 43 the learned author says:

> The powers and remedies of a vendor under a "long-term" agreement for sale and purchase seem therefore to compare unfavourably with those which would be conferred upon him if the agreement were carried into effect before possession by his giving a conveyance and taking back a mortgage of the land for the balance of purchase-money and interest thereon.

Where, however, the vendor is a mortgagee exercising his power of sale, the advantage lies with the vendor; if the mortgagee enters into an agreement for sale and purchase only, he need not give credit to the mortgagor for the purchase-money payable under the agreement for sale and purchase, until it has actually been paid; whereas, if he transfers the mortgaged premises to the purchaser and takes a mortgage back for the unpaid purchase-money, he must thereupon credit the mortgagor with the full amount of the purchase-money: *Wright* v. *New Zealand Farmers' Co-operative Association of Canterbury, Ltd.*, [1936] N.Z.L.R. 157—affirmed on appeal by the Judicial Committee of the Privy Council, [1939] N.Z.L.R. 388.

The disadvantages from the purchaser's point of view are at once manifest, for throughout he lacks the protection conferred by the legal estate, which remains vested in the vendor. Furthermore, if the land is mortgaged, serious complications may arise, if the purchaser is not adequately advised; this topic is referred to later in discussing *Abigail* v. *Lapin*, [1934] A.C. 491, *Ryder* v. *Arkle*, [1935] G.L.R. 725, and Precedents Nos. 6 to 9 (*post*). To guard against the lack of the legal estate, the purchaser should register a caveat, if the land is under the Land Transfer Act, or register the agreement itself, if the land is under the "old system." Ten or twelve years ago a solicitor was ordered by the Supreme Court to pay his client (the purchaser) damages, because he had omitted to search the title and to advise his client to register a caveat.

2. *Effect of Failure to Lodge Caveat.*—Two cases show how disastrous may be the effect of a purchaser's failure to lodge a caveat, when the land is under the Land Transfer Act.

In *Abigail* v. *Lapin*, [1934] A.C. 491 (an appeal to the Privy Council from Australia), an equitable interest prior in time was postponed to a later equitable interest, because, by omitting to lodge a caveat with reasonable promptitude, the owner of the first equity had enabled the registered proprietor of the legal estate in fee-simple to represent that he was capable of dealing unrestrictedly with the fee-simple. (For an explanation of this most important case, see *51 Law Quarterly Review*, 283.) The remarkable feature of this case was that the owner of the equity later in time, who was held by the Privy Council to have preference, had not searched the Register-book; it must be added, however, that he had no notice of the prior equity when he acquired his own, and he had acted to his prejudice by advancing money on mortgage to the registered proprietor. The principle of *Abigail* v. *Lapin* is undoubtedly applicable to our Land Transfer Act: it is a decision of the highest tribunal binding on our New Zealand Courts, and can be disregarded by practitioners only at their peril.

The second case is one nearer home, a decision of Mr. Justice Callan, *Ryder* v. *Arkle*, [1935] G.L.R. 725. A. purchased from B., at auction, a seaside section (part of the Arkle's Bay Estate) for £150, payable by instalments. A. did not search the title, which was under the Land Transfer Act: had he done so, he would have found that the Arkle's Bay Estate was subject to a mortgage in favour of C. The section which A. purchased was part of a subdivision and had no legal road frontage. A. continued his payments under the agreement for seven years, when he found that he could not take title: meantime he had erected a cottage on his section at a cost of £220. Default was made under the mortgage, and six years later C. exercised his power of sale in favour of D., who thus acquired title to the whole of the Arkle's Bay Estate, freed from the equitable rights of A., who appears to have lost everything involved in his transaction—the purchase-money he had paid and the cottage he had erected. As His Honour points out, B. had no right to grant any estate to A., in derogation of C.'s prior legal mortgage. Now *Abigail* v. *Lapin* shows that A.'s rights would have been postponed to C.'s mortgage (whether it was registered or unregistered) even if C.'s mortgage had been dated *after* A.'s agreement, unless A. had registered a caveat before the date of C.'s mortgage, or unless C. had had notice of A.'s agreement. The judgment concludes thus:

> This case illustrates several things, for example, the impropriety of selling and the folly of buying land of which the only road frontage is a merely "paper" road, the desirability of employing a solicitor to search and advise as to title *before* purchasing land, and the folly of building upon land before having obtained title thereto.

As to a purchaser building upon land before having obtained title thereto, I am afraid that in normal times that is done right throughout New Zealand, almost as a matter of daily custom. In *Ryder* v. *Arkles*, A., the purchaser of the section, would have been safe in erecting the cottage, when he did, if—

(*a*) The subdivisional plan had been deposited by the District Land Registrar and the necessary road to give a road frontage duly dedicated and registered.

(*b*) The title had been searched and some satisfactory arrangement made with C., the mortgagee, to release his mortgage over A.'s section, when A. required it. This probably would have involved paying part of the purchase-money to C.

(*c*) A. had promptly after his agreement registered a caveat. This would be necessary to prevent owners of subsequent equitable estates and rights from gaining priority over A.

3. *Both Vendor and Purchaser have Proprietary Rights in the Land.*—It is commonly said that in the interval between contract and conveyance the property sold belongs in equity to the purchaser: *Williams on Vendor and Purchaser*, 4th Ed. 546. But until payment of the purchase-money in full, the vendor has his own personal and substantial interest, which he is entitled to protect. Therefore a vendor independently of any statutory provision or contractual right cannot recover from a purchaser, even if the purchaser has gone into possession, any payment which the vendor has made under a statutory liability arising before the time fixed for completion: *In re Waterford Corporation and Ware's Contract*, [1943] 1 All E.R. 48. Thus both the vendor and purchaser may transfer their rights, and both may and should protect their rights by insurance, if there are buildings or other improvements.

4. *Fire Insurance.*—Whilst on the topic of insurance it is vital to bear in mind (1) that a contract of fire insurance is a personal contract between the insured and the insurer and that the benefit thereof is not assignable without the insurer's consent; and (2) that, as from the date of the contract, the property stands at the risk of the purchaser. Reference may here be made to *Goodall's Conveyancing in New Zealand* 49, note (*c*). The learned author states:

> The only safe methods are to insure both parties pending completion for their respective rights and interests—*i.e.*, unpaid vendor and purchaser respectively—under one policy, or alternatively for the vendor (with the consent of the insurers) to agree to hold his own existing policy for the benefit of the purchaser, which is virtually an assignment.

The writer has seen the following clauses used in practice:—

> (*a*) The purchaser will insure and keep insured all buildings as aforesaid in the joint names of the vendor and purchaser against loss by damage or fire in some responsible insurance office or offices in Auckland to be approved by the vendor to the amount of the full insurable value thereof And will forthwith immediately after every such insurance as aforesaid shall have been effected deliver to the vendor the interim receipts and policies for every such insurance as aforesaid And will not later than the forenoon of the day on which any premium for such insurance falls due deliver or cause to be delivered to the vendor the receipt for the payment of such premium.
>
> (*b*) In the event of the said buildings being destroyed or damaged by fire all moneys payable under or in respect of

any such insurances as aforesaid shall at the sole option of the vendor be applied either in or towards the rebuilding or reinstating the buildings destroyed or damaged as aforesaid or whether the balance purchase-money or any part thereof be then due or not in or towards payment of the balance purchase-money and interest.

Goodall gives at least two precedents dealing with insurance, cl. 8, p. 45 ; cl. 3, p. 49.

To negative the rule that, as from the date of the contract, the property stands at the risk of the purchaser, the writer has seen in practice the following clause inserted :—

If the buildings shall be destroyed or damaged by fire or earthquake to the extent of more than one-third before date of possession this contract shall be null and void and the deposit returned.

Suffice it to say that the matter of insurance must not be overlooked by the solicitor or solicitors acting in an agreement for sale and purchase of land comprising insurable property.

5. *Assignment of Vendor's Rights.*—Precedents 4 and 5 deal with assignment of the vendor's rights under an agreement for sale and purchase of land. Precedent No. 4 assigns not only the vendor's rights to the unpaid purchase-money, but also his estate in the land, and is therefore liable to *ad valorem* stamp duty at the highest rates under s. 79 (*a*) of the Stamp Duties Act, 1923. Precedent No. 5, on the other hand, assigns only the unpaid purchase-money and is liable to conveyance duty at lower rates under s. 79 (*b*), *ibid.*

But, if the assignee under Precedent 5 should afterwards find it expedient to take a transfer of the legal title from the original vendor, additional conveyance duty at the highest rates assessed on the value of the land as a voluntary conveyance will be payable: *Saunders* v. *Commissioner of Stamp Duties*, [1927] G.L.R. 54. Precedent No. 4 appears the more appropriate, if there is a substantial proportion of money still owing under the agreement for sale and purchase, and there is a likelihood of the purchaser defaulting. Precedent No. 5 would be safe where the purchaser having paid a good proportion of the purchase-money, the possibility of his not completing is remote. Precedent No. 4 would support a caveat, but No. 5 would not: *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Hall*, [1938] N.Z.L.R. 1020, G.L.R. 516.

6. *Assignment of Purchaser's Rights.*—As to this, see Precedents Nos. 2 and 3. The former is appropriate where the agreement for sale and purchase does not require the vendor's consent to an assignment of the purchaser's interest. Precedent No. 3 may be used where the vendor's consent to an assignment is necessary. Corporations selling under long term agreements, *e.g.*, local bodies under the Housing Act, and see also Housing Regulations (Serial No. 1942/176)—usually insert a provision that the vendor's consent is necessary. Whether the consent of the vendor is or is not necessary, it seems advisable for the assignee's solicitor to ascertain from the vendor exactly what is owing under the agreement for sale and purchase, and whether or not its covenants have been carried out by the purchaser.

Assignments hereunder are liable to *ad valorem* conveyance duty at the highest rate under s. 79 (*a*) of the Stamp Duties Act, 1923, assessed on the *total* of (*a*) the consideration moving from the assignee to the assignor *and* (*b*) the amount owing under the agreement for sale and purchase : s. 96 of the Stamp Duties Act, 1923.

(*To be continued.*)

CORRESPONDENCE.

Arbitration and Fair Value of Shares in Private Companies

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

DEAR SIR,—

Section 16 (1) of the Arbitration Amendment Act, 1938, is as follows :—

Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

We know that very often in building contracts the architect is named as the person to settle a dispute, and in contracts for public works the engineer is frequently appointed, and we presume that under s. 16 the contractor, in case of disputes, could avail himself of the provisions of this section.

There is also a third class of cases where the above section may have introduced a change, but although the Amendment Act has been in force since January 1, 1939, we have not heard of anybody having availed himself of this section.

We refer to the restriction of the alienation of shares in a private company where it is frequently provided that in case of a dispute in the price of shares the auditor shall fix the fair value and his decision shall be binding on both parties.

Now it is obvious that, on the one hand, the auditor of a private company should be the person with the best knowledge of the value of the shares, but, on the other hand, his position as auditor, appointed, as he is annually, may render him, perhaps unconsciously, biased in favour of the company, which is continuing, as against the selling shareholder who is passing out of the picture.

Many articles of association which name the auditor as the person to fix the value of the shares, speak of it as a "reference" arising when a "dispute" or "difference" has arisen, and in such cases it is submitted that the auditor is appointed as an "arbitrator," and not as an "appraiser" or "valuer."

If that be the case the Amendment Act of 1938 has made an important change in the position of shareholders in private companies, and the writer would like to read the views of your readers on the point.

Yours, &c., INQUIRER.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Judgments as Literature.—Opening a temporary library for the Inner Temple to replace that destroyed by enemy action, the Lord Chancellor (Viscount Simon) made some observations on judgments as literature. He said that there were some passages which were worth reading from the pronouncements of Judges, not for their legal profundity, but because of the charm or pungency of their composition, and that he had thought that a small volume might be published called "Selected Judgments," where the passages would be chosen for their literary merit, their point and finish. But the Lord Chancellor must have disappointed his listeners by his somewhat commonplace and entirely inadequate instances of probable inclusions in such a book—Lord Sumner, Lord Macnaghten, Maule, J. (on the alternative to bigamy), O'Brien, L.C.J. of Ireland (on infant's necessaries), and Bacon, V.-C. (on the length of the case). His audience would not have expected an exhaustive list; but why, in such company, omit Lord Bowen? Or the Earl of Birkenhead? Or McCardie, J.—on wife's necessaries, for example? And do the Reports contain no observations of Scrutton, L.J., which would qualify on grounds of pungency, if not on grounds of charm? And, if one could stretch a point and regard summings-up to juries as the equivalent of judgments, would not Lord Hewart have strong claim on not dissimilar grounds? If the standard is to be set by Maule, J., Bacon, V.-C., and "Peter the Packer," there are many more who would qualify.

Scrutinizing Delegated Legislation.—Those who listened to the broadcast from the B.B.C. by Wickham Steed, former editor of *The Times* (London), on May 21, will have heard of the decision of the House of Commons to set up a Parliamentary Scrutinizing Committee to watch delegated legislation. At the date of the broadcast the exact powers of the Committee were not known, but the commentator's words make abundantly plain the purpose of the Committee and the hopes of those responsible for its constitution:

> This week the House of Commons, and the Government, have given its free institutions a strong injection of anti-bureaucratic serum to counteract the creeping paralysis of freedom which is wont to set in when officialdom runs riot with what it is called "delegated legislation." . . . The more the complexity of administration tends to multiply Government Departments, and to put power into the hands of officials who are not directly under the Parliamentary control, the greater becomes the danger that the substance of individual freedom may be frittered away by a multitude of administrative regulations, which officials draw up, or apply, by way of putting into practice the laws which a democratic Parliament may enact. . . . In time of war, it may be inevitable. In time of peace, it may be more than nuisance: it may become a positive danger, the harder to check because of its insiduous character. So on Wednesday, after a very good debate in the House of Commons, it was decided to set up a Parliamentary Scrutinizing Committee that should keep an eye on these things, and do its best to make sure that democratic freedom should not be smothered or strangled by delegated legislation.

Solicitor's Right to Interview Witnesses.—On October 19 last, this page reprinted from *The Times* (London) a report of certain observations attributed to Lewis, J., at Manchester. The report made it appear that the Judge had ruled it to be improper for the solicitor for an accused person to *interview* a witness for the prosecution. Lewis, J., later forwarded the papers in the particular case to the Council of the Law Society of England; but, when doing so, he explained that he had not been fully reported by *The Times* and that his remarks were directed to the case of suspected *tampering* with a witness. The Council of the Law Society has since investigated the case and has come to the conclusion that there was no tampering with the witness and no impropriety on the solicitor's part. The Council has taken the opportunity of recording the fact that it has always held the view that there is no property in a witness and that, so long as there is no question of tampering with the evidence of witnesses, it is open to the solicitor for either party to civil or criminal proceedings to interview, and take a statement from, any witness or prospective witness at any stage of the proceedings, whether or not he has been interviewed or called as a witness by the other party.

The Week-end Task.—Solicitors are only too prone not to enter up their diaries regularly and not to send out their accounts promptly. A client who will pay cheerfully as soon as your work for him is finished is inclined to scan your bill much more closely if he receives it long after the transaction is passed. This was the substance of an address given at a Law Clerks' Dinner at New Plymouth, by the late Thomas Cotter, K.C., who, with Sir John Findlay, K.C., happened to be in that town attending a circuit sitting of the Supreme Court. Cotter concluded by saying that he himself made a point of devoting every Saturday evening to a careful perusal of entries against the various clients and to seeing what accounts could be rendered forthwith. Later in the evening Sir John Findlay spoke. He made a few seemingly irrelevant allusions to Burns and then said: "I yield to none in my admiration to Burns. I have studied him and I think that I can understand and appreciate him; but, until I heard my learned friend's sage advice to you this evening, I had never fully grasped the meaning of 'The Cotter's Saturday Night'."

The Overlooked Authority.—*Jones* v. *Amalgamated Anthracite Collieries, Ltd.*, [1944] 1 All E.R. 1, and *McMahon* v. *Lawson*, [1944] 1 All E.R. 36, disclose an unusual story of a binding authority overlooked. In these appeals the House of Lords had to consider two separate questions in the workers' compensation law. *McMahon's* case was an appeal from the Court of Sessions of Scotland, and *Jones's* case was an appeal from the English Court of Appeal. The *McMahon* appeal was argued in the Lords about a fortnight before the *Jones* appeal, but judgment in both appeals was given on the same day. In both cases the House of Lords based its decision largely upon a previous decision of its own, given as far back as 1911; but the remarkable fact is that that previous decision was not cited in argument at any stage of *McMahon's* case, and was cited in argument in *Jones's* case only when that case reached the House of Lords.

BELGIAN JUSTICE IN GREAT BRITAIN.

Assimulation to British Judgments.*

One of the sovereign rights which all States have most jealously guarded is the right of the State to administer its own justice, within its boundaries, by means of its own Courts.

As the Lord Chancellor recently said, in times gone by this right, in French *droit de haute et basse justice*, was a royal privilege and was exercised by the King in person. It is, in our country, administered in the King's name.

No sovereign State can allow upon its own territory officers of a foreign State to carry out decisions of Courts ; of that State.

The reason for this is obvious : justice has not the same value or meaning in all parts of the world and it would be unwise to recognize the validity of any foreign judgment without some supervision by the domestic Courts ; moreover the citizens of the realm should not be left without any protection in respect of arbitrary measures taken against them in foreign countries.

The principle generally admitted by international law is that when a foreign judgment must be executed this judgment is re-examinable by the domestic Courts.

In countries ruled by civil law this is done by means of the procedure of exequatur : the Court to which the judgment is submitted not only examines its form and validity as to jurisdiction, it may refuse its execution on the ground that it is contrary to public policy, and it may even re-examine it on its merits.

In countries ruled by common law the rule is that no execution can issue upon a foreign judgment without a new suit in the domestic Courts.

An exception to this rule has been made by Britain in 1936 in respect of Belgian judgments : the numerous and close relations between the two countries have led them to devise a more simple means of proceeding : judgments in civil and commercial matters, given by any superior Court in the territory of one country are now, with the exception of a few specified cases, fully recognized in the Courts of the other country, and, if the judgment is executory in the country of the original Court, the jurisdiction of this Court under the law of its own country cannot even be questioned.

So that an important barrier has been withdrawn, and this proves to what extent each one of the two Governments trusts the justice of the other.

It is a remarkable fact that the Belgian system should be, in judicial matters, so closely connected with the British ; this connection with Britain is even more complete than that which exists between sister States inside the American Federation.

The United States Constitution provides that full faith and credit shall be given in each State to the public records and judicial proceedings of every other State, but this only means that, whereas a judgment rendered in one State may serve as the undisputable evidence of a fact, it can nevertheless not be treated as a home judgment in the sister States. In other words, the real effect of the full faith and credit provision is merely to establish a binding rule of evidence, but not to make the judgment itself enforceable elsewhere.

The effect of the Anglo-Belgian Convention, however, is to make a Belgian judgment to all practical purposes a domestic judgment as soon as it has been registered by the High Court of Justice of England, and such judgment can be executed in England in exactly the same way as a British judgment. This is, of course, reciprocal, and even before 1936 a British judgment could be executed in Belgium by means of exequatur.

Other arrangements had been made between the two countries in 1932, placing the nationals of each country on the same footing as denizens of the other country in respect of *cautio judicatum solvi*, and in respect of poor persons to whom a free defence can be granted by Court.

The British Parliament in passing the Allied Maritime Courts Act, 1942, went somewhat further, this time in the field of criminal law : not only does the Act allow allied Courts to sit in England, it recognizes the validity of their sentences without any interference of British Courts and with an engagement to carry them out. The fact that the Act provides not only for disciplinary jurisdiction, as did the Allied Forces Act, 1940, but for criminal jurisdiction is certainly a novel idea. It also fills a gap, as it provides, amongst other things, for punishment of offences committed on the high seas by foreign seamen on foreign ships in respect of which the British Courts would have found some difficulty in administering British justice, owing to lack of jurisdiction upon the offender.

Nothing in the Allied Maritime Courts Act deprives any British Court of jurisdiction in respect of any act or omission constituting an offence against the law of any part of His Majesty's Dominions. It follows that any crime or offence committed on British soil and punished by the laws of this country will be tried by British Courts.

In respect of offences committed on British soil, there is only one instance in which the Allied Maritime Courts have jurisdiction : that is, in the case of an offence committed by an Allied seaman in contravention of Allied mercantile maritime conscription law ; in other words, it is only in cases of desertion that the newly-instituted Courts will be competent to try an offence committed in Britain.

There has often been question of unifying criminal law, congresses have met, and many lawyers have endeavoured to find a solution to this problem.

In the field of criminal science, which these Maritime Courts are now applying, co-operation has hitherto still been sporadic. A tribute should be paid to the endeavour of the Commission Internationale Pénale et Pénitentiaire and to the Howard League of Penal Reform to which we are indebted for so much progress in this sphere. Another movement has been initiated by the University of Cambridge, the criminal department of which had some time ago instituted a survey of the penal systems of the European countries ; this field was widened, on consideration, to include plans for the restoration of a proper system of criminal justice in Europe and for continued collaboration after the war. A conference of representatives of nine allied countries who had come to Cambridge with that aim created an International Commission for Penal Reconstruction

* Extracts from a speech delivered by Mr. de Baer, President of the Maritime Court of Appeal, at the Inauguration of the Maritime Courts.

and Development which is working now, and I hope it will be able to achieve some progress.

We all realize, as Professor Winfield puts it, "how closely crime is implicated with imperfections in the structure of society as a whole, and not merely with the moral lapses of this or that individual in it," but the more one compares penal laws of civilized countries, the more one realizes that their affinities are far greater than the differences between them, the more one feels that the true principles which lie at their base are the same.

Of course, there are many differences between the British and the Belgian systems: the British law calls upon a jury to bring a verdict in many more instances than the Belgian law, and the prosecution is not conducted in the same way. We have bodies such as our Court of Errors (Cour de Cassation) which do not exist here, and the part taken by the Judge in conducting trial is perhaps more active with us than it is over here.

But these differences in machinery are unimportant when the fundamentals correspond. What do slight variations in technique matter when the spirit which gives the whole system its meaning is the same? In both our countries cannot the public with absolute confidence, go to justice with the security of getting an honest, a fair trial? In both countries a criminal is made to pay; the prison system is the same, it is human and aims at reformation more than at deterrence.

LAND AND INCOME TAX PRACTICE.

Pensions Payable from United Kingdom and Eire—British Government Securities.

The following information in connection with the liability to taxation in the United Kingdom and Eire of pensions payable to residents of New Zealand from public revenues and from other sources has been made available from an authoritative source. The extracts below also contain useful references to a general liability attaching to income arising in those countries.

The United Kingdom authorities advise—

"I am to inform you that all income arising in the United Kingdom (with the exception of interest on certain British Government securities, to which special privileges are attached when the beneficial owner of the securities is not ordinarily resident in the United Kingdom) is chargeable to United Kingdom income tax, irrespective of the place of residence of the recipient.

"Official pensions are chargeable under Schedule 'E' of the Income Tax Act, 1918, which provides:—

"'Tax under Schedule E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable by the Crown or out of the public revenue of the United Kingdom other than annuities charged under Schedule C, for every twenty shillings of the annual amount thereof.'

"Similar provisions apply to pensions payable otherwise than out of the public revenue by persons who are resident in the United Kingdom.

"The expression 'The United Kingdom' in this letter includes Northern Ireland, but excludes Eire. Pensions payable by the Eire Government to persons who are not resident in the United Kingdom are not chargeable to United Kingdom income tax, but may be liable to Eire income tax."

The Eire taxation authorities advise—

"Regarding the assessability of the income tax of Eire of long-service pensions payable by the Government of Eire to persons who are resident in New Zealand, I would advise that such pensions are chargeable to the income tax of Eire. A certain measure of relief is granted to certain individuals under the provisions of s. 8 of the Finance Act, 1935."

The above advice was in reply to an inquiry which made particular reference to the significance of the decision in *Texas Co. (A'sia.), Ltd.* v. *Commissioners of Taxation*, (1940) 5 A.T.D. 298, 344, regarding the meaning of the word "chargeable," which appears in s. 89 of the Land and Income Tax Act, 1923. In this connection readers are referred to the notes appearing in (1943) NEW ZEALAND LAW JOURNAL regarding the inclusion and treatment of overseas income in New Zealand tax returns.

The latest information as contained in *Tolley's Income Tax Chart Manual for 1943-44* shows that if a non-resident British subject derives *all* his income from British-taxed sources he may claim the same personal, family, reduced-rate, and earned allowances as if he were resident in the United Kingdom. If he derives *half* of his income from British-taxed sources he can claim half those allowances, and so on. Where both British and Dominion income tax or sur-tax (which includes social security charge and national security tax in New Zealand) has been paid by a taxpayer on the same part of the income for the same year, relief is allowed by the United Kingdom authorities, subject to a limit of half the rate of British tax (including sur-tax) charged on the claimant. The Commissioner of Taxes in New Zealand will furnish certificates of payment of New Zealand income-tax or social security charge and national security tax for transmission by the taxpayer to the United Kingdom authorities—the Commissioners of Inland Revenue, Imperial Hotel, Llandudno, Caemarthenshire, North Wales.

The Government of Eire taxation authorities state that any individual not resident in Eire is ordinarily chargeable at the full standard rate in respect of any income arising from sources within Eire. Relief may be claimed by—

(i) A citizen of Eire; or
(ii) A person who is resident out of Eire for health reasons; or
(iii) A citizen, subject, or national of New Zealand; or
(iv) A person who prior to 1934–35 or in any previous year was, and still is, a British subject; or
(v) A person who was employed in the service of the Government of Eire or the British Crown in the year 1934–35, or in any previous year.

Claim forms or further information may be obtained from the Secretary, Revenue Commissioners (Claims Branch), 11–13 Upper O'Connell Street, Dublin.

British Government Securities.

Income derived by a resident of New Zealand from British Government securities is liable to be included in taxation returns as "unearned," "assessable," or "non-assessable" income, dependent upon whether the interest arising in the United Kingdom is chargeable with United Kingdom income tax or not. Due to the fact that United Kingdom income tax is not always deducted at the source of the interest, there is an impression that the interest in such cases is "tax free" in the United Kingdom and is therefore assessable unearned income in New Zealand.

A publication recently received from the United Kingdom contains a complete schedule of British Government Securities outstanding in March, 1943, and indicates in a convenient manner whether there is an exemption from United Kingdom income tax to persons who are not ordinarily resident in the United Kingdom. There is no particular definition of the term "ordinary residence," which connotes the usual place of residence or habitual resort. The schedule is reproduced below. Where there is no exemption to persons not ordinarily resident in the United Kingdom the income from the investment concerned is *non-assessable* income in New Zealand. Where the word "Yes" appears the interest paid to persons not ordinarily resident in the United Kingdom is exempt from United Kingdom tax and the interest is therefore *assessable* in New Zealand. Where there is any deduction of United Kingdom tax, the gross amount before deduction of United Kingdom tax, plus exchange thereon, is to be returned in New Zealand income-tax returns and social security declarations. United Kingdom tax is deducted at the rate in force when the interest is paid—(the present standard rate is 10s. in the £1).

Name of Security.	Dates Interest payable.	Whether Tax deducted (Tax is not deducted where Interest does not exceed £2 10s. per Half-year.)			Whether ex'ption to person not ordinarily resident in U.K.
		Inscribed or registered	Bearer.	On Post-office holding.	
Consols 2½%	5 Jan. 5 April 5 July 5 Oct.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Consolidated Loan 4%	1 Feb. 1 Aug.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Conversion Loan 2%, 1943–45	1 Jan. 1 July	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Conversion Loan 2½%, 1944–49	1 April 1 Oct.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Conversion Loan 3%, 1948–53	1 Mar. 1 Sept.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Conversion Loan 3½%	1 April 1 Oct.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Conversion Loan 5%, 1944–64	1 May 1 Nov.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Defence Bonds 3% (Post Office only 1st, 2nd, and 3rd issues)	(1) 1 May 1 Nov. (2) 1 Mar. 1 Sept. (3) 1 Jan. 1 July.	Post Office issue only.		Tax not deducted.	Yes.
	(No person may hold more than £1,000 Defence Bonds except those which are inherited.)				
Funding Loan 2½%, 1956–61	15 April 15 Oct.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Funding Loan 2¾%, 1952–57	15 June 15 Dec.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Funding Loan 3%, 1959–69	15 April 15 Oct.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
Funding Loan 4%, 1960–90	1 May 1 Nov.	Tax deducted.	Tax deducted.	Tax not deducted.	Yes.
National Defence Bonds 2½%	15 Mar. 15 Sept.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
National Defence Loan 3%, 1954–58.	15 Jan. 15 July.	Tax deducted.	Tax deducted.	Tax not deducted.	No.
National Savings Certificates	Accumulated interest not assessable and not regarded as income.				
National War Bonds 2½%, 1945–47	1 Jan. 1 July	Tax deducted.	Tax deducted.	Tax not deducted.	Yes.
National War Bonds 2½%, 1946–48	15 Feb. 15 Aug.	Tax deducted.	No issue.	Tax not deducted.	Yes.
National War Bonds 2½%, 1949–51.	1 Feb. 1 Aug.	Tax deducted.	No issue.	Tax not deducted.	Yes.
National War Bonds 2½%, 1951–53	1 Mar. 1 Sept.	Tax deducted.	No issue.	Tax not deducted.	Yes.
Savings Bonds 3%, 1955–65	15 Feb. 15 Aug.	Tax deducted.	No issue.	Tax not deducted.	Yes.
Savings Bonds 3%, 1960–70	1 Mar. 1 Sept.	Tax deducted.	No issue.	Tax not deducted.	Yes.
Tax Reserve Certificates.	When Certificate redeemed for payment of taxes.	—	—	—	*
Treasury Bills	—	Tax not deducted.		—	†
Victory Bonds 4%	1 Mar. 1 Sept.	Tax deducted including interest not exceeding £5 p.a.	Tax deducted.	Tax not deducted.	Yes.
War Loan 3%, 1955–59	15 April 15 Oct.	Tax deducted.	Tax deducted.	Tax not deducted.	Yes.
War Loan 3½%	1 June 1 Dec.	Tax not deducted.	Tax deducted.	Tax not deducted.	Yes.

* Interest exempt from all United Kingdom taxation.
† For bills issued after March 9, 1916.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Divorce.—*Decree Absolute—Respondent's Costs unpaid.*

QUESTION: My client obtained a decree *nisi* in divorce against his wife, and he was ordered to pay her costs. He now desires to apply for the decree absolute, but has not fully paid the costs so ordered. Can the respondent wife successfully oppose the making of the decree absolute on the ground that the costs have not been paid in full?

ANSWER: The Court has a discretion to withhold the granting of the decree absolute until payment of such costs. In a recently reported case, *Bramley* v. *Bramley and Harrison*, [1944] N.Z.L.R. 341, where the costs concerned were costs in excess of the amount comprised in an order for security, it was held that if a suit in which a wife is charged with adultery has gone to trial and the husband has obtained a decree *nisi*, the fact that he has not complied with an order for costs in excess of the amount comprised in the order for security is not a sufficient ground for withholding the decree absolute until the additional costs have been paid. *Molloy* v. *Molloy and Burg*, (1929) S.A.S.R. 80, was applied; and see, also, *Dimery* v. *Dimery*, [1934] N.Z.L.R. 732, G.L.R. 610; *Gower* v. *Gower*, [1938] P. 106, [1938] 2 All E.R. 283; and *Lewis* v. *Lewis*, [1921] P. 299.

2. Income-tax.—*Apartment House—Part retained as Owner's Residence—Standing Charges and Depreciation—Apportionment for Return of Owner's Income.*

QUESTION: My client owns a property which she has subdivided into three flats, two of which are let, the other being used as her own residence. What is the basis of apportionment of standing charges and depreciation adopted by the Department in determining the net income, and is it necessary to furnish an income-tax return showing details of the income and expenditure? My client has no other income.

ANSWER: Standing charges, such as rates, insurance, interest, and depreciation, are usually apportioned by deducting from the total of such expenses the amount applicable to that portion of the area of the building which is occupied by the owner. In making such calculations, areas which are common to landlord and tenant—*e.g.*, passage-ways, kitchen, bathroom, &c.—should not be included. A rule-of-thumb method is to base the apportionment according to the number of rooms occupied by the landlord and tenants, but where there is a material discrepancy in the sizes of rooms—*e.g.*, all the large rooms let to tenants while small rooms are retained by the owner—an apportionment on an area basis may be more equitable.

In connection with interest on money borrowed to convert an existing building into flats or rooms for letting, a division on the basis of capital put into the portion let, and that occupied by the owner, appears to be a more equitable basis than an area basis. In these cases depreciation is allowable on the cost of the premises used for producing rentals.

Where a boardinghouse, flats, or combined business premises and residential quarters are leased and sublet, the total annual rent paid by the lessee will be reduced by the fair annual rental value of the quarters occupied by him. A fair test would be, What would the owner obtain as rent for the quarters occupied by the lessee?

Details of gross rental and expenses are not required to be shown for social security charge and national security tax purposes. An income-tax return would not be required unless the total income, including net rents, is in excess of £200.